Carpenter Technology Corporation *and* United Steelworkers of America International Union, AFL–CIO, CLC. Cases 4–CA–33564, 4–CA–33744, and 4–RC–20898

March 31, 2006

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On August 11, 2005, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

We affirm the judge's finding that the Respondent unlawfully disciplined employee Barry Geib for distributing union literature. In this regard, we agree with the judge that the Respondent failed to show that it would have disciplined Geib even in the absence of his union activity. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[3]

As the judge found, Geib distributed union literature in a nonwork area on nonworktime. Because of this activity, the Respondent issued a verbal warning to Geib prohibiting him from leaving his work area at any time, for any reason.

The Respondent cites safety concerns—Geib's being alone in a dangerous area—as the reason for issuing the warning. The judge properly rejected that contention. The warning was not limited to times when Geib was alone in unsafe areas; it forbade him to go anywhere outside his work area, at any time, under any circumstances.

Moreover, as the judge found, the warning to Geib was inconsistent with the Respondent's treatment of employees who did not engage in union activities. The Respondent had never articulated a safety rule prohibiting employees from leaving their work areas. To the contrary, the Respondent knew that employees frequently left their work areas even for personal visits to employees in other departments, but had never disciplined any employee for that conduct. Indeed, when Geib left his work area again a month after receiving the verbal warning, but did not engage in union activity, he was not issued another warning. In these circumstances, we cannot find that the Respondent would have issued Geib a verbal warning in the absence of his union activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Carpenter Technology Corporation, Reading, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Change the date in the last sentence in paragraph 2(b) to October 26, 2004.

2. Substitute the attached notice for that of the administrative law judge.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten that existing pension, 401(k), and ESOP plan benefits and coverage would be lost if you select a union to represent you in collective bargaining.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container,* 325 NLRB 17 (1997). We shall also substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[3] Although we agree with the judge's reasoning, we find the considerations discussed in the text above sufficient to reject the Respondent's *Wright Line* defense. In addition, we find the pretextual nature of the Respondent's proffered defense to be additional evidence that the warning to Geib was unlawfully motivated.

WE WILL NOT warn, discipline, or otherwise discriminate against you because you engage in protected or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful verbal warning issued to employee Barry Geib on October 26, 2004, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the verbal warning will not be used against him in any way.

CARPENTER TECHNOLOGY CORPORATION

William Slack, Esq., for the General Counsel.
John W. Tryon, Esq. and *Gary D. Melchionni, Esq. (Stevens & Lee),* of Lancaster, Pennsylvania, for the Respondent.
Brad Manzolillo, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This consolidated case was tried in Philadelphia, Pennsylvania, on June 28 and 29, 2005. The complaint alleges that, in a widely distributed memo and in group meetings with employees, Respondent violated Section 8(a)(1) of the Act by threatening employees that they would lose certain pension, 401(k), Employee Stock Ownership Plan (ESOP), and retiree benefits if they selected the Charging Party Union (the Union) as their collective-bargaining representative. It also alleges that Respondent violated Section 8(a)(3) and (1) of the Act by issuing a written document "considered to be a verbal warning" to employee Barry Geib for discriminatory reasons, because he was engaging in union activities.[1] The conduct alleged as unfair labor practices also forms the basis of objections filed by the Union to an election it lost. Respondent filed an answer denying the essential allegations of both the complaint and the objections. After the trial, the parties filed briefs, received on August 1, 2005, which I have read and considered.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, with a facility in Reading, Pennsylvania, is engaged in the manufacture and distribution of specialty steel alloy materials. During a representative 1-year period, Respondent, in conducting its business operations, purchased and received, at its Reading facility, goods valued in excess of $50,000 directly from outside the Commonwealth of Pennsylvania and the State of Delaware. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent's Reading facility employs some 1800 employees, almost 1200 of whom are production and maintenance employees (Tr. 164). The facility covers a large geographical area, with numerous structures separated by roads, parking lots, and walkways, on both the east and the west sides of the Schuylkill River (Tr. 8). Employees use a bridge that runs over the river to get from buildings on the West Shore to ones on the East Shore. The hand mill building, at which some of the events in this case took place, is a very large structure on the East Shore (Tr. 9).

Pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 4 on October 12, 2004, a Board-conducted election was held on November 11, 2004, in the following appropriate unit:

> All full time and regular part time production and maintenance Employees and coordinators employed by [Respondent] at its facilities located at Reading, PA., excluding all other employees, individuals on permanent lay off, office clerical employees, Engineers, Laboratory Technicians, guards and supervisors as defined in the Act.

The Union lost the election by a vote of 602 to 524, but thereafter filed timely objections and unfair labor practice charges, resulting in the instant proceeding.

B. Respondent's November 3 Memo

As part of its campaign against the Union, Respondent distributed a 2-page memo, dated November 3, 2004, to all employees. (GC Exh. 8.) The memo was in the form of a letter to employees signed by John Thames, the vice president of human resources. It purported to be based on questions raised in group meetings, which began two days before the memo and continued throughout that week. See discussion below. The subject of the memo was whether existing employee benefit plans would change if the employees voted to be represented by a union. The contents of the memo, in relevant part, are set forth below:

> Question: Can the pension plan change if employees vote to be represented by a union?
>
> Answer: Yes. The current pension plan is subject to negotiation. Any new plan could result in a benefit that is more, the same, less, or discontinued. Under the General Retirement Plan (GRP) Master Plan description, adopted January 1, 1950 and restated on February 19, 1999—on page 4, item (q)(5):

[1] The complaint alleges that Respondent made the same threats of loss of benefits in the November 3 memo and in three of the group meetings. The objections do not specify when or in what circumstances the threats were made. It appears that essentially the same statements were made in all the approximately 30 group meetings with employees. What was said in all the group meetings was fully litigated.

(q) "Employee" means any person employed by the Company except as excluded below:

(5) A person who is accruing under a separate special agreement (including collectively bargained agreement) with the Company.

This means that at the point in time in which you become subject to collective bargaining, you no longer fit the definition of an employee under the plan description and would be excluded from the plan as a non-employee. Whatever benefit you have accrued to that time belongs to you. The question is what type of plan would be put in place of the current pension plan. That is subject to negotiation. We believe the situation would be as follows:

If the union is voted in, you maintain the status quo. You no longer fit the definition of employee under the GRP as you become subject to a collective bargaining agreement. A "New" pension plan is on the table for negotiation. Based on the results of negotiations, employees might begin vesting in [the] "new" pension plan. The "New" pension plan could be the same or different than the current plan. It depends on the results of negotiations.

. . . .

Question: Can the 401(k) plan change if employees vote to be represented by a union?

Answer: Yes. The plan is subject to bargaining. There is no guarantee your participation in the plan would continue. As a result of bargaining, your benefit could be more, the same, less or discontinued. Based on the definition of employee in the 401(k) plan description, employees subject to collective bargaining would be excluded. Under the rules of the 401(k) plan participation stops immediately. Whether you have a 401(k) plan in the future and whether the company contributes to it, is subject to the outcome of collective bargaining.

Question: Can the Employee Stock Ownership Plan (ESOP) change [if] employees vote to be represented by a union?

Answer: Yes. The plan is subject to bargaining. There is no guarantee your participation in the plan would continue. As a result of bargaining, your benefit could be more, the same, less or discontinued. Based on the definition of employee in the ESOP plan description, employees subject to collective bargaining would be excluded. Under the rules of the ESOP, accruals stop immediately. Whether or not you have an ESOP in the future is subject to the outcome of collective bargaining.[2]

[2] Respondent introduced into evidence another document, dated November 4, 2004, which was also apparently distributed to all employees and discusses possible changes in the pension plan if the employees selected the Union (R. Exh. 3). The General Counsel has not alleged that anything in this document violated the Act because, as he stated in his brief (Br. 4), unlike the November 3 memo, nothing in the November 4 document "would automatically disqualify employees from participation upon acquisition of Union representation."

C. The Group Meetings

During the week or so before the election, beginning on November 1, Respondent held about 30 meetings with groups of employees—so-called town meetings—to discuss several issues in the union campaign. All employees attended one or another of the meetings, at which Vice President of Human Resources John Thames and Senior Vice President Dennis Oates spoke. (Tr. 260–261, 268.) They were introduced by General Manager Tom Reed. (Tr. 279–280.) It is undisputed that Respondent posed questions that were placed on an overhead projector and visible on a screen at the front of the meeting room; management officials answered the questions. Among the questions posed and answered, was one handled by Thames, relating to the Respondent's pension plan, question 10, which asked, "If the union wins, can we continue with the current Carpenter pension plan as is?" As there was apparently no written script or transcription of the response to the question, the only evidence on the response comes from the testimony of witnesses in this proceeding.

The General Counsel called four employee witnesses to testify about Thames's answer to question 10. They testified that he read the question—"If the union wins, can we continue with the current Carpenter pension plan as is?"—and that he answered, "No." According to two of the witnesses, Thames went on to say that, under the pension plan rules, the employees would no longer fit the definition of employee (Tr. 147, 154). One witness testified that Thames said the employees would have to "start over" in negotiations (Tr. 155). All four admitted that Thames said something more in his answer, but they could not remember what. Respondent called six employee witnesses. Like the General Counsel's employee witnesses, they could not remember all of what Thames said in answer to question 10. All gave a conclusory denial that they heard a threat to take away benefits, but testified in different ways about what was said. Two of those witnesses testified that Thames stated the parties would start from "zero" (Tr. 296, 309) and one testified that Thames said something about "starting from scratch" or "like a new beginning." (Tr. 317–318.)

Respondent also called management witnesses Thames, Oates, and Reed, as well as Bill Jonas, an independent labor consultant who advised Respondent during the union campaign, and Area Manager Bob Lord, who were present during some of the meetings. Thames, whose testimony was the most comprehensive, acknowledged that he answered the posed question—"If the union wins, can we continue with the current Carpenter pension plan as is?"—by stating the words "as is" in the question permitted him to answer it by a simple, "No." He then explained that the pension plan covered many different groups of employees and the language of the plan excluded "bargaining unit people." (Tr. 262–263.) On cross-examination, he acknowledged that he told employees that the definition excluded "people in the bargaining unit" (Tr. 272) and that, if they chose union representation, they could not be covered by the plan "as it was currently drafted." (Tr. 271–272.) Thames also testified that he told employees there were three tim e frames to consider: First, where the employees were "right now," the period "as of today" and "up until November 11," the date of the election; the pension plan to that point was "solid,

protected, it's yours . . . it's not going to be lost." The second period would be after any union victory and during negotiations. During that period, according to Thames, he told employees "everything stays as is." He further testified, "Status quo is the language we kept referring to." The third stage, according to Thames, was "when an agreement was reached, there would be whatever the agreement called for." He then went on to relate what might be in a final agreement. He testified that he said, "And that could be more, it could be less, it could be very different, it could be similar to what they had." He also answered a conclusory question from Respondent's counsel by denying that he threatened to take away existing benefits (Tr. 263–266, 273, 275). Oates, Reed, Lord, and Jonas essentially corroborated Thames' account, although in less detail (Tr. 318–320, 282, 290–291, 205–206).[3]

Thames' testimony was in accord with that of some employee testimony in two crucial respects: He acknowledged that he answered the question whether the pension plan would continue "as is" if the employees selected the Union by stating, "No." He also acknowledged that he told employees that, under the plan's definition, employees lost coverage if they selected the Union. In my view, the testimony of the management officials, including Thames, as to what else Thames said in response to the question was somewhat conclusory and selective. It seems likely that Thames would have continued his answer by making essentially the same points he made in his November 3 memo to employees. After all, he had signed and written the memo and it was distributed at about the same time the group meetings were being held. In contrast, the testimony of management officials, which was different, at least in emphasis, from what was stated in the November 3 memo, was given months later, after the complaint had issued and they had a better understanding of their legal position. In any event, although Thames' testimony about what he said after his initial comments was somewhat confusing, it did not refute his earlier statements that the pension plan would not continue "as is" and employees would be excluded from the plan upon their selection of the Union. Indeed, that testimony reinforced those statements. Thames said that, in assessing the impact of the union election on the pension plan, employees ought to consider three time frames. He said nothing would be lost in the first time frame, that is, the period prior to the election. The second time frame, which he described as being different from the first time frame, was the period after the election and prior to an agreement's being reached. Although he testified that he said everything would stay the same during this second time frame, that statement is at odds with his earlier statements that nothing would be lost up to the date of the election, but that if employees chose the Union, the plan would not continue "as is;" at that point, they would be excluded from the plan and their future benefits would depend on what the Union could win in collective bargaining. The very mention of a second time frame different from the first suggests a difference in application of the pension plan and retention of benefits. The only way Thames' testimony about the second time frame makes any sense is if he told employees that, although accrued pension benefits up until the time of the election would not be lost, benefits would no longer accrue thereafter, unless the Union was able to negotiate them in some future collective-bargaining agreement. That view is also reflected in the November 3 memo.

Similarly, I do not credit employee testimony that Thames specifically said that the employees would have to "start over" in negotiations, the parties would start from "zero" or from "scratch," and it would be "like a new beginning." Although I believe the employees' testimony honestly reflected their understanding of Thames' remarks, I conclude that Thames' actual words merely reiterated the themes spelled out in his November 3 memo.

With this background, and based on my assessment of the credibility of all the witnesses, I find as follows. Thames responded to question 10 by stating that the pension plan would not continue "as is" if the Union won the election. He then went on to state that the language of the plan excluded employees upon their selection of the Union and their, thus, becoming members of a "bargaining unit." Although I cannot fully credit the testimony of either management or employees as to what Thames said after these initial comments, I believe that Thames' further comments did not refute his earlier statements and they essentially repeated the message of his November 3 memo.

Analysis

An employer violates the Act, and engages in objectionable conduct that requires overturning an election, when its words reasonably convey the impression, during an election campaign, that employees will be excluded from an existing benefit plan upon choosing a union to represent them in collective bargaining. That impression is not dispelled by a reference to negotiations that may follow union representation, unless that reference makes clear that the employees do not lose benefits or coverage during negotiations. *Hertz Corp.,* 316 NLRB 672 fn. 2 (1995). See also *Handleman Co*., 283 NLRB 451, 452 (1987) (exclusionary language in benefit plan not unlawful because it contemplated "the continuation of coverage during the negotiations" and left "continued coverage to collective bargaining, allowing the parties to agree to continued coverage or not"); and *KEZI, Inc.*, 300 NLRB 594, 595 (1990) (exclusionary language not unlawful because it is "triggered only by the completion of good faith bargaining—not by the mere commencement of bargaining on this topic"). Indeed, preelection suggestions that, after selection of a union, subsequent bargaining starts from "zero" or from "scratch" are unlawful if they give the impression that existing benefits may be lost upon selection of a union and may be regained only after the vagaries or uncertainties of negotiations. See *Ryder Truck Rental,* 341 NLRB 761 (2004), enfd. 401 F.3d 815 (7th Cir. 2005). The Board examines such suggestions in context to determine whether they "effectively threaten employees with the loss of existing

[3] I discount conclusory testimony from any witness—employee or management official—either affirming or denying that threats were made. It is difficult enough for lawyers and judges to decide what is or is not a threat. Conclusory testimony from witnesses on this point is not helpful; testimony on the matter is helpful only insofar as it recites what was said.

benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore," or—conversely—whether they indicate that any "reduction in . . . benefits will occur only as a result of the normal give and take of collective bargaining." *Federated Logistics & Operations*, 340 NLRB 255 (2003), enfd. in relevant part 405 F.3d 920, 924–927 (D.C. Cir. 2005), and authorities cited therein.

When evaluating allegedly coercive campaign statements, the Board has been advised by a unanimous Supreme Court to "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The Court also stated that an employer should make his views known without engaging in "brinksmanship." At the least, he should avoid "conscious overstatements he has reason to believe will mislead his employees." Id. at 620.

Applying the above principles, I find that Respondent's references, in the November 3 memo, to changes in its 401(k) plan and its ESOP plan if "the employees vote to be represented by a union" were unlawful and objectionable. In both instances, the question posed by Respondent was whether the plans could "change" if the employees voted "to be represented by a union." The answer given was, "Yes." This was followed by a statement that the plans were "subject to bargaining," followed immediately by the caution, "There is no guarantee that your participation in the plan[s] would continue." Respondent also stated that employees "subject to bargaining" were excluded from the plans by definition. "Subject to bargaining" is clearly something different from "after collective bargaining" or after the conclusion of negotiations or execution of a collective-bargaining agreement. Thus, the reasonable implication is that employees would lose their participation rights in the existing plans upon voting for the Union. Indeed, that implication was reinforced by what followed. Respondent emphasized that, under the rules of the 401(k) plan, "participation stops immediately." And, under the ESOP plan, "accruals stop immediately." Thus, not only was there no assurance that the benefits of, and participation in, the existing plans would continue during negotiations, but Respondent's language emphasized the opposite: If the employees chose a union to bargain on their behalf, they would not be eligible to participate in the plans and would lose all unaccrued benefits. That impression was not dispelled by Respondent's peppered and ambiguous references to negotiations that might follow selection of the Union. Indeed, unlike in its statements about loss of coverage or participation when employees became "subject to collective bargaining"—a clear reference to employees selecting a collective-bargaining representative—Respondent's statements about possible future benefits were conditioned on the "outcome of collective bargaining." Accordingly, Respondent's message was that the benefits of participating in those plans would be lost and might or might not be recaptured in collective bargaining.

In these circumstances, I find that, in its November 3 memo, Respondent threatened that, if the employees voted to be represented by a collective-bargaining agent, they would lose coverage and benefits they presently enjoyed under Respondent's existing 401(k) and ESOP plans. Those threats were violative of Section 8(a)(1) of the Act, and, because they were widely disseminated to all employees, constituted objectionable conduct that interfered with the fairness of the election.

Respondent's threats with respect to loss of participation in the 401(k) and ESOP plans infected its discussion of the pension plan, also mentioned in the same November 3 memo. The thrust of its message was the same: If employees selected the Union, they would be excluded from participation in the pension plan and their future coverage and benefits would depend on the outcome of negotiations. Here again, the Respondent posed the question whether the plan could change if the employees voted for the Union and answered, "Yes." And, here again, the Respondent stated that the current pension plan was "subject to negotiation." But what followed clearly implied that, upon selecting the Union and throughout negotiations, the employees would no longer be eligible to participate in the plan. Respondent set forth the exclusionary language in the pension plan and gave its interpretation of that language. It stated that "at the point in time in which you become subject to collective bargaining, you no longer fit the definition of an employee under the plan description and would be excluded from the plan as a nonemployee." As indicated above, the phrase "subject to collective bargaining" clearly means upon selection of a union rather than after the conclusion of collective bargaining. Thus, the message was that the employees would no longer be participants in the pension plan upon selection of the Union. Indeed, the subsequent statement, "Whatever benefit you have accrued to that time belongs to you," suggests that there would be no accrual thereafter, that is, during negotiations. Accordingly, the message was that employees would lose both participatory rights and benefits upon selection of the Union and they would have to try to recapture those lost rights and benefits in negotiations.

In light of the above threats, the last part of the pension plan discussion in the November 3 memo is somewhat confusing. But nothing in that subsequent discussion refutes the earlier statements that employees would be excluded from the existing plan upon voting for the Union and would have to regain their coverage and lost benefits in collective bargaining. Interposing the words "status quo," mentioning an accurate definition of employee coverage and adding the possibility of negotiating a "new" pension plan did not cure the unlawful statements, but only added an element of ambiguity to Respondent's threats. Indeed, viewed in the light most favorable to Respondent, the memo states both an unlawful and a lawful interpretation of the plan's exclusionary language. Even under this view, however, Respondent created an ambiguity, which would lead employees reasonably to infer that they could lose pension coverage upon selecting the Union. Such ambiguities are read against the party creating them. See *Unifirst Corp*., 335 NLRB 706, 707 (2001); and *Ellison Media Co.*, 344 NLRB 1112, 1113 and fn. 5 (2005).

In these circumstances, and considering the similar messages of Respondent with respect to the 401(k) plan and the ESOP plan, I find that Respondent conveyed the impression that the

employees would lose their right to participate in the pension plan upon their selection of the Union and could regain that right only after negotiations, which might result in a "new" and perhaps less desirable plan. Accordingly, the Respondent's message about pension plan changes amounted to a threat in violation of Section 8(a)(1) of the Act. Because that message was widely disseminated to all employees, it also amounted to objectionable conduct that interfered with a free election.[4]

Applying the same principles set forth above to Thames' remarks in response to question 10 in the group meetings with all employees, I also find that Thames separately threatened a loss of pension benefits if the employees selected the Union. Based upon my credibility determinations and findings of fact set forth above, I find that Thames made essentially the same threats about loss of pension rights in the meetings as he did in his November 3 memo. More particularly, he stated emphatically that, upon selection of the Union, the pension plan would not remain "as is." He also cited his interpretation of the pension plan's exclusionary language, stating that the employees would no longer be participants in the plan after they selected the Union. Here again, as in the November 3 memo, Thames gave no assurances that employees would continue to be covered or accrue benefits during the period after the Union was selected and while negotiations were in progress. Indeed, he said that employees were excluded from the plan upon their selection of the Union and their future benefits would depend on the ultimate results of collective bargaining. Thames thus conveyed to employees that they would lose at the least the accrual of future benefits unless the Union was able to recapture those benefits at the bargaining table. Thames' remarks in this respect comported with the message in his November 3 memo and had nothing to do with what he said would happen after an agreement was reached. In these circumstances, I find that Thames' remarks at the group meetings amounted to a separate violation of Section 8(a)(1) of the Act, as well as objectionable conduct that interfered with a fair election.

In its brief (Br. 12–13), Respondent asserts that the exclusionary language of the pension plan is lawful because it simply precludes participation in the plan upon coverage of employees in a different plan, including one under a collective-bargaining agreement. But that is not the violation alleged and found here. Both in his November 3 memo and in his statements at the group meetings, Thames gave his *interpretation* of the pension plan's exclusionary language, which does not, by its terms, preclude coverage of union-represented employees. Not only was Thames' interpretation different from the actual language in the plan, but Thames' interpretation tied loss of coverage to selection of the Union, not to execution of a collective-bargaining agreement. And he implied that the lost coverage and benefits would have to be recaptured in negotiations. That is what was unlawful, under the applicable authorities cited and discussed above.[5]

D. The Warning Issued to Employee Barry Geib

Barry Geib was a flex utility operator in the bar finishing department, also known as department 34, which was located in one of the buildings on the West Shore. He was active in the Union's campaign in the period leading up to the election of November 11, 2004. For example, he distributed union literature both outside the facility and inside, in break areas (Tr. 23). He himself wrote and signed three letters to employees setting forth his reasons for supporting the Union and urging employees to vote for the Union in the upcoming election. He also made known his prounion feelings in conversations and meetings with his immediate supervisor, Area Manager Bob Lord. (Tr. 29–31.)[6]

On October 24, 2004, Geib attended a union meeting, at which some hand mill employees who worked on the East Shore complained that they never received union literature. The next day, October 25, Geib attempted to remedy the matter by delivering and distributing union literature at the East Shore buildings, including the hand mill building. At the end of his shift, at 2 p.m., Geib, armed with union literature and still wearing his safety equipment, left his work station in department 34 on the West Shore, and crossed the bridge over the river to the East Shore part of the facility. After crossing the bridge, he walked around the perimeter outside the hand mill building and went across the street into what is called the old locker room, a nonwork area. He went through the locker room and distributed some of the union literature. He then went to the new locker room, another building nearby, and similarly distributed union literature there. (Tr. 31–34.) Thereafter, he went inside the hand mill building and placed union literature on a picnic table, which was in a nonwork area used by employees during breaks. Nearby was a separate structure, a building within the very large hand mill building; it functions as an office, which housed the hand mill coordinator and a clerical employee. No other employees were working in the hand mill building at the time and the lights and machinery were shut off. After placing literature on the picnic table, Geib walked out of the hand mill building and returned to the locker rooms. When he came

[4] Although the General Counsel's brief does not address the issue, the complaint also alleges that the reference, in the November 3 memo, to changes in the retiree medical plan is likewise violative of the Act for the same reasons. I do not reach that issue. Such a finding would be cumulative and would not appreciably affect the order in this case or the ruling on objections. Moreover, it is unclear whether the reference to retiree medical benefits is limited to already retired employees, and thus implicates issues under *Georgia Power Co.,* 325 NLRB 420 (1998), discussing *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co*., 404 U.S. 157 (1971). Because no party has raised or discussed those issues, I am reluctant to address them here, particularly since it appears unnecessary to do so in the posture of this case.

[5] It appears that Respondent's argument in this respect applies only to the alleged violation dealing with the pension plan, not the alleged violations dealing with the 401(k) or the ESOP plan. Respondent's discussion of those plans in the November 3 memo did not include a statement of the actual exclusionary language of those plans.

[6] Two of the three letters written by Geib were distributed to employees by hand and the other was reproduced and mailed to all production and maintenance employees by the Union. Tr. 25–26; GC Exh. 3, 4, and 5. It appears that only one of the three letters was distributed before the issuance of his verbal warning in late October 2004. Tr. 86–87. In the last letter, Geib referred to the incident that led to his verbal warning, although he did not mention the warning itself; he simply mentioned that Respondent had confiscated some union literature he had distributed on October 25.

back, about 15 minutes later, he looked inside the hand mill building and noticed that the union literature he had placed on the picnic table had been removed. He immediately suspected that the coordinator had removed the literature so he went to the office, approached the coordinator, an employee named Joe Yadlowsky, and told him that he had no right to remove the union literature and that he, Geib, was going to report the matter to the Union and the Labor Board. According to Geib, Yadlowsky replied, "What literature?" (Tr. 34–37.)

After the above confrontation, Yadlowsky immediately called his area manager, Michael Kershner, and told him what had happened. According to Yadlowsky, he told Kershner that someone had approached him in the office and accused him of violating Federal law by removing union literature from the picnic table. Kershner, who was at another location, then agreed to come to the handmill building. (Tr. 178.) Yadlowsky also testified that he had indeed removed the union literature on the picnic table and mentioned that fact to Kershner. (Tr. 181.) According to Kershner, Yadlowsky told him that there was an individual walking through the hand mill building with a "bag full of literature." (Tr. 183.) Kershner told Yadlowsky he would be right over, and notified his superior, Scott Herber, the manager of the hot mills. Herber and Kershner got into separate vehicles and drove the short distance to the hand mill building, where they met with Yadlowsky. (Tr. 178, 183–184.)

In the meantime, Geib had left the hand mill building, but, when he reached the bridge leading to the West Shore, he decided to return to replace the union literature that had been removed. This time, he entered the hand mill building at one of the north entrances and walked through the plant on his way down to the picnic table near the office. (Tr. 37–38.) When Geib was about 50 yards away from the office, Kershner, who had been talking to Yadlowsky, noticed Geib and called for him to stop. When Kershner confronted Geib, he asked Geib who he was and what he was doing there. Geib identified himself, said he had been in the hand mill building in the past and mentioned that he was distributing union literature. Kershner then recognized him as an employee he knew. (Tr. 40–41, 190.)[7]

After this initial exchange, Kershner, according to his own testimony, asked if Geib had accused anyone in the office of removing union literature. (Tr. 190.) Geib denied that he had, but admitted that he had talked to someone about removing union literature, stating that he had placed union literature in the building and that it was removed shortly thereafter. Kershner then asked if he had seen anybody removing union literature and Geib said he had not. Kershner then said that Geib should be more careful about accusing people without proper justification. At that point, he asked whether Geib was on the clock; and Geib said he was off duty. After this exchange, Kershner mentioned that he was concerned for Geib's safety because no one else was present in the area. (Tr. 191, 195–197,185–186, 40–41.) According to Geib, the discussion ended when Kershner escorted him out of the building. (Tr. 40.)[8]

In due course, Kershner's report of what had happened in the hand mill building reached Geib's supervisors. The next day, October 26, at about 10 a.m., Area Manager Bob Lord asked Geib to come to a meeting in Department Manager Rich Zeller's office. At the meeting, Zeller presented Geib with a written document that he had prepared. (Tr. 41–47, 226.) The document (GC Exh. 6), which stated that it was to be "considered a verbal warning," and listed its subject as "Distributing of Literature/Safety Issue," read as follows:

> On Monday, October 25, 2004 at approximately 3:00 pm and again at approx. 3:45 pm Barry Geib was observed distributing literature in the Hand Mills (Bldg 1) on the East Shore of the plant. He was observed placing literature at non-work areas. Although this was after his shift and also after the scheduled shift at the Hand Mills, it is unacceptable for him to be out of his normal work area. This could be a potential safety issue if he were to be injured or incapacitated while in an unfamiliar area, particularly when no one is in the area to assist. He must refrain from any activities that would take him outside his normal work area, whether on shift or not or during working or non-working hours.
>
> Barry understands that future occurrences could lead to Corrective Performance.[9]

After he received the above document, Geib submitted a response on the back of the document setting forth his position,

[7] Geib had worked in the hand mill building on previous occasions and he was familiar with the interior of the building. He testified that, when confronted by Kershner, he made a reference to having gone through the mill on previous occasions, using it as a shortcut to pick up his car. Kershner's testimony is that Geib stated that that was his reason for going through the mill on this occasion. Whatever the exchange about Geib picking up his car, it is clear that Kershner knew that Geib was there to distribute union literature. Geib, who testified that he told Kershner that this is what he was doing, was obviously carrying union literature at the time; and Kershner had been told that someone, who turned out to be Geib, had been observed carrying union literature in the hand mill building.

[8] The above sequence in Kershner's interrogation of Geib was developed during his cross-examination by counsel for General Counsel, obviously based on a pretrial affidavit. On direct, Kershner never mentioned any discussion of union literature between him and Geib (Tr. 191); and, even later, in response to Respondent's attorney's questions, Kershner tried to emphasize that he first discussed safety issues with Geib. Still later, on re-cross, when he was shown his affidavit, he admitted that he discussed the union literature issue before he discussed safety issues. Tr. 194–197. I find that Kershner was deliberately evasive in trying to emphasize his concern with safety issues, as opposed to Geib's distribution of union literature, in an effort to strengthen Respondent's case. Thus, I cannot credit his testimony on the crucial issues in this case, except where it is contrary to Respondent's interests.

[9] Under the Respondent's formal corrective performance procedure—an apparent progressive discipline policy, an employee is presented with certain written notifications and warnings leading to "suspension with intent to discharge." Tr. 232. Verbal warnings are not themselves considered part of the corrective performance procedure. Tr. 231–232. But one management official testified that such warnings could lead to "corrective performance [Tr. 208];" and another testified that verbal warnings remain in at least the employee's departmental file and may be utilized when considering discipline, transfer or promotion Tr. 244–245.

including that his distribution of union literature in the hand mill building had been done in nonwork areas, that he was familiar with the building because he had worked there in the past, and that he had also worked alone in the past, with the knowledge of his supervisor, and no one had questioned that that was inappropriate. (GC Exh. 7.)

Analysis

Motive-based allegations of discrimination are decided under the framework of the Board's *Wright Line* decision.[10] The General Counsel must establish by a preponderance of the evidence that the employee's protected or union activity was a substantial or motivating factor in the challenged decision. Once the General Counsel meets his initial burden, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action against the employee, even in the absence of protected or union activity. The issue is, thus, not simply whether the employer "could have" disciplined the employee, but whether it "would have" done so, regardless of his union activities. See *Alexandria NE LLC*, 342 NLRB 217, 219 (2004), and *Structural Composites Industries*, 304 NLRB 729, 730 (1991). Accord: *Brandeis Machinery & Supply Co. v. NLRB*, 412 F.3d 822 (D.C. Cir. 2005).

In the instant case, the General Counsel has established that the warning issued to Geib was based on his union activities, namely passing out union literature. The warning itself states that one of its subject matters was distribution of literature. Moreover, the first two sentences of the warning deal with Geib passing out literature; only later does the warning mention other factors such as Geib being out of his normal work area and potential safety concerns. Likewise, when Kershner confronted Geib in the hand mill building, the first thing he mentioned was Geib's accusation that someone removed the union literature he had placed in nonwork areas. Kershner told Geib he should be careful in making such accusations, a particularly ironic statement because the person Geib accused of removing the union literature admitted that he had done so. Indeed, the reason Kershner came to the hand mill building at all was that he was notified that someone was passing out union literature. Only after Kershner's remarks about Geib's accusations concerning the removal of union literature did Kershner mention safety concerns connected with Geib being away from his work station in a building that he may not have been familiar with, at a time when no one else was present. This evidence not only satisfies the General Counsel's initial burden as to discriminatory motive, but it shows that whatever other reasons were given at the time of the verbal warning were secondary in nature and would not have, in themselves, resulted in issuance of the warning.

In the face of this evidence, Respondent was unable to independently and persuasively show that it would have issued a warning to Geib in the absence of his having passed out union literature. For example, the warning itself gives few specifics about what was wrong with Geib being in the hand mill building. And it cites no work place rule that was violated. The warning simply states that Geib was out of his normal work area, even though it acknowledges that he was off duty and that he distributed literature only in nonwork areas. Significantly, one month later, Respondent noted another incident when Geib was out of his work area, but, on that occasion, which did not involve union activity, Geib was not issued a verbal warning. (Tr. 247–249.)

The warning of October 26 also alludes to "a potential safety issue if [Geib] were to be injured or incapacitated while in an unfamiliar area, particularly when no one is in the area to assist." But that is speculative at best. The evidence shows that Geib was familiar with the interior of the hand mill building because he had worked and been there in the past, and that he and others worked alone many times, with the knowledge of supervisors who did not complain or issue warnings about that. The evidence also shows that many employees, including Geib, left their normal work areas to go elsewhere in the facility on their nonwork time. It also shows that many employees came to their work areas before the beginning of their shift and remained after the conclusion of their shifts. Geib's uncontradicted testimony is that he did not walk in congested or dangerous areas when he was in the hand mill building and there was plenty of light for him to see where he was going. He also credibly testified, without contradiction, that there were no signs either inside or outside the building limiting access to off duty employees or employees who worked in other buildings. (Tr. 48–62, 87–90, 96–106, 116–121, 127–128, 132–143, 155–157.) Indeed, one management official confirmed that there were no posted signs limiting access to the hand mill building (Tr. 189) and another testified that Respondent never communicated to employees generally any prohibition against staying in the facility after an employee's shift was concluded (Tr. 249–250). Finally, the warning broadly restricts Geib's future movements beyond his "normal work area" even on nonwork time. This restriction is not tied, or related in any way, to safety issues. Thus, not only has Respondent failed to show that it would have issued the warning in the absence of Geib's union activities, but the evidence shows that what Geib did was something that was common practice among the employees, with supervisory knowledge and without supervisory objection.

Nor is Respondent's position aided by the testimony of the officials most involved in the issuance of the warning. It was Zeller who essentially decided to issue the warning to Geib after he was notified of the incident at the hand mill building the day before (Tr. 238).[11] But not only did Zeller have no first hand knowledge of what had transpired, but it is clear that he attempted to support his issuance of the warning by relying upon a completely unrelated matter. Zeller testified that he keeps summary department files on all 170 production employees under his authority, including Geib (Tr. 238–239), and that he could only recall one previously documented verbal warning for something he considered similar to what Geib did. That

[10] *Wright Line*, 251 NLRB 1083 (1989), enfd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[11] Zeller testified that he spoke to his superior, General Manager Tom Reed, before issuing the warning. Tr. 235–236. But Reed testified that, when he talked to Zeller about the matter, he simply wanted someone to talk to Geib; Reed did not expect a warning to be issued. Tr. 278–279, 283.

was a verbal warning issued to employee Gary Collar in February 2002. (Tr. 229–230.) Zeller described Collar's infraction on that occasion as his having been in a restricted area "that he should not have been in." (Tr. 240–241.) Later, however, when documentation of the warning was produced, it appeared that Zeller misrepresented the gravamen of Collar's infraction, which was in no way comparable to Geib's alleged offense. Collar's verbal warning was for "disruptive activities," and it was the last in a string of warnings, mostly for poor performance. (Tr. 327–328.) According to the verbal warning, Collar went to his former work area while other employees were working and engaged them in controversial discussions as to why he had been previously transferred out of that area. (Tr. 329.) Collar was cautioned that "his statements can and do have a serious negative effect in an already strained work environment." (Tr. 330.) This is clearly a different kind of impropriety than the one for which Geib was charged. Collar's warning does not support the contention that Geib committed an offense that was uniformly punished by the issuance of a verbal warning. Moreover, I find that Zeller's initial misrepresentation in this matter reflects adversely on his credibility and establishes that the allegedly lawful reason he advanced for the verbal warning—that Geib was out of his work area—was a pretext. In these circumstances, I find that Respondent has not shown, through Zeller's testimony, that Geib would have been issued a verbal warning in the absence of his union activities. Indeed, the pretextual reason advanced by Zeller buttresses the finding of unlawful motive for the warning.

The only other management official who played a significant role in the issuance of the warning was Kershner. His report eventually led to issuance of the warning and he was the only management official who knew first hand what had happened, although he did not actually see how Geib reached the point at which they met in the hand mill building. This was after Geib had distributed union literature in nonwork areas and before he had a chance to replace the literature that had been removed. As shown in the factual statement, Kershner was alerted to come to the hand mill building by a report that someone was passing out union literature there. Kershner's first questions of Geib after confronting him in the hand mill building and finding out who he was and what he was doing there, were about his distribution of union literature, which, of course, is what Geib was doing in the building, and Geib's accusation that someone had removed the union literature. Only later did Kershner mention his concern for Geib's safety. This shows Kershner's motivation not only for confronting Geib, but for his report to Geib's superiors that led to the verbal warning. As I also indicated earlier in this decision (see fn. 8, above), Kershner was deliberately evasive when testifying about this matter. Thus, I find that Kershner was more concerned with Geib's union activities than any safety issues presented by Geib's being in the hand mill building after hours with no one else present. The safety issues were an afterthought and a pretext; they would not have prompted Kershner's report in the absence of Geib's union activities.

In these circumstances, I find that the real reason for the Respondent's actions was Geib's union activities. Respondent has not persuasively shown that it would have issued the warning absent Geib's union activities. Accordingly, I find that, by issuing the warning to Geib, Respondent violated Section 8(a)(3) and (1) of the Act.[12]

E. The Representation Case

One of the Union's objections in the representation case—renumbered Objection 5 (GC Exh. 1(j))—tracks the complaint allegations with respect to the threatened loss of benefits. That objection, based on a widely disseminated memo addressing the loss of three important employee benefits—the pension plan, the 401(k) plan and the ESOP plan—is sustained. That alone requires overturning the election of November 11, 2004, and holding a new election. I also sustain renumbered Objection 5 based on Thames's answer to question 10 in the group meetings attended by all the employees, which reinforced the message set forth in the November 3 memo. I do not reach renumbered Objections 2, 3, and 4.[13]

The remaining objection (renumbered Objection 1) tracks the complaint allegation with respect to the warning issued to Geib. Although I found that issuance of the warning was discriminatory and amounted to a violation of the Act, I do not sustain the corresponding objection. There is no evidence that news of the warning itself was widely disseminated, although, in Geib's "final message to employees [GC Exh. 5]," which was widely distributed (see fn. 6, above), he stated: "When I put union literature on the break area picnic table in the HandMills on Monday, October 25th it took less than 10 minutes for the coordinator . . . to dispose of it." This was, of course, the incident that led to the warning. Nevertheless, I cannot find that the issuance of the warning, in and of itself, even though it was a serious unfair labor practice, interfered with a free election. The election unit was composed of over 1100 employees. In these circumstances, I find it doubtful that news of a warning issued to a single employee would alone have been so widely known and significant enough to taint the election results. See *Clark Equipment Co.*, 278 NLRB 498, 505 (1986).

[12] In his brief (Br. 22), the General Counsel asserts that the warning's broad restriction on Geib's future movements outside his normal work area, even on nonwork time, constitutes a separate and independent violation. That violation, however, was not alleged in the complaint and the matter was not fully litigated in the specific way the General Counsel presents it in his brief. I agree with the General Counsel, however, that such a broad prohibition had nothing to do with alleged safety concerns and thus confirms the illegality of the warning itself. See GC Br. 22 at fn. 13. But a separate finding of another violation is not necessary in this case. The remedy for the violation found includes expungement of the warning, including the restrictive language referred to by the General Counsel.

[13] Renumbered Objections 2, 3, and 4 include more specific allegations of threats of loss of benefits. To a certain extent, those specific allegations are subsumed in the more general alleged threats set forth in renumbered Objection 5. I also note that the Union does not specifically rely on those objections in its posthearing brief. In view of my determination to sustain the objection relating to the threat that the employees would lose coverage under the current pension plan, 401(k) plan and ESOP plan (renumbered Objection 5), I do not reach the more specific issues presented by renumbered Objections 2, 3, and 4.

CONCLUSIONS OF LAW

1. By threatening that existing pension, 401(k), and ESOP plan benefits and coverage would be lost if the employees selected a union to represent them in collective bargaining, Respondent violated Section 8(a)(1) of the Act.

2. By issuing a warning to employee Barry Geib for engaging in union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

3. The above violations are unfair labor practices within the meaning of the Act.

4. By committing the violations set forth above in item 1, Respondent interfered with the election of November 11, 2004, thus requiring the election to be set aside.

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended[14]

ORDER

The Respondent, Carpenter Technology Corporation, Reading, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening that existing pension, 401(k), and ESOP plan benefits and participation would be lost if the employees select a union to represent them in collective bargaining.

(b) Warning, disciplining or otherwise discriminating against employees because they engage in union activities.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this order, remove from its files, including departmental files, the any reference to the verbal warning issued to employee Barry Geib on October 26, 2004, and within 3 days thereafter notify him in writing that this has been done and that the warning will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its principal office and place of business in Reading, Pennsylvania, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 3, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

IT IS ALSO ORDERED that Case 4–RC–20898 be severed and remanded to the Regional Director to conduct a new election when she deems it appropriate.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

[15] If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."